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IN THE SUPREME COURT OF THE STATE OF OREGON.

FRANK KIEMAN, APPELLANT, v. CITY OF PORTLAND ET AL., RESPONDENTS. PETITION FOR REHEARING DENIED BY JUDGE KING.

Presented by Mr. BROWN.

APRIL 6, 1911.—Ordered to be printed.

IN THE SUPREME COURT OF THE STATE OF OREGON.

FRANK KIEMAN, APPELLANT, *v.* CITY OF PORTLAND ET AL., RESPONDENTS.

APPEAL FROM THE CIRCUIT COURT OF MULTNOMAH COUNTY, HON. GEORGE H. BURNETT, JUDGE.—ON PETITION FOR REHEARING.

(For former opinions see 111 Pacific, 379, 382.)

RALPH R. DUNIWAY, *Attorney for Appellant.*
FRANK S. GRANT, *City Attorney.*
W. C. BENBOW, *Deputy City Attorney.*
C. W. FULTON, M. L. PIPES, and H. H. RIDDELL, *Attorneys for Respondents.*

KING, *J.* Denied.

Filed December 31, 1910; J. C. Moreland, Clerk of the Supreme Court.

KING, *J.* The principal point suggested by the petition for rehearing is the contention that the people of Oregon have no power, by constitutional provision or otherwise, to deprive the legislature of the sovereign power to enact, amend, or repeal any charter or act of incorporation for any city or town, and any attempt so to do is void. The constitutional provisions amending Article XI, adopted in June, 1906, known as the charter amendments, are as follows:

SECTION 1 a. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislative assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legis-

lation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent of the legal voters may be required to order the referendum, nor more than fifteen per cent to propose any measure, by the initiative, in any city or town.

SEC. 2. Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of Oregon.

It will be observed from the first sentence in section 2 that no restriction is placed upon the legislature with respect to the enactment of general laws, the exception being that no special laws creating or affecting the municipalities shall be enacted by the legislature. Under all the rules of construction this exception reserves to the legislative department the right, whether by the people directly through the initiative or indirectly through the legislature, to enact general laws upon the subject, making it clear that the inhibition in the next sentence has reference to special laws.

In Farrell *v.* Port of Portland (52 Oreg., 582, 586) it is held that the initiative amendments to the constitution bearing upon the creation and government of municipalities, including section 1 of Article XI, must be construed together. In considering the effect of section 2, Article XI, it is there said:

> But this section and the language used in it should not be construed alone. It is a part of the initiative and referendum scheme first inaugurated by the amendment of 1902 and subsequently enlarged and extended by the amendments of 1906. All these amendments, so far as they refer to the same subject matter, should be read together, and be so interpreted as to carry out the purpose of the people in adopting them, regardless of the technical construction of some of the language used.

Since the above is the rule regarding the various amendments taken as a whole, much stronger must be the reason for reading and construing together all the sentences in the one section, from which it is obvious that the only restriction placed upon the legislature by section 2 pertains to the passage of special laws affecting municipalities. These agencies of the State are thereby enabled to enact such local measures, to revise existing local laws, and to exercise their powers affecting them, and thus carry out their general scope and purpose, so long as they are not inconsistent with the constitution of the State or of the United States, and are in harmony with all the special laws and general laws of the State constitutionally enacted. (Straw *v.* Harris, 54 Oreg., 424, 443.) The language following the above excerpts from page 587 of the opinion in Farrell *v.* Port of Portland, concerning the limitations placed by the amendment upon the legislature, must be interpreted in the light of the questions there under consideration, from which it is manifest reference was had only to special laws affecting municipalities. The so termed "general initiative and referendum scheme" there alluded to, and whether it is in violation of this provision of the Federal Constitution, is fully considered and determined adversely to petitioner's contention in Kadderly *v.* Portland (44 Oreg., 118), and State *v.* Pacific States Tel. & Tel. Co. (53 Oreg., 163), and there held to be not in conflict or inconsistent therewith. Other cases impliedly, if not expressly, sustaining this position are: Farrell *v.* Port of Portland (52 Oreg., 582); Straw *v.* Harris (54 Oreg., 424); Haine *v.* City of Forest Grove (54 Oreg., 443); State *v.* Langworthy ((Oreg.), 104 Pac., 424).

The question, however, as to whether the people may, by constitutional amendment, reserve to themselves the right to enact any law to the exclusion of the legislature, and by such method delegate to municipalities powers not subject to abridgment, change, limitation, or recall by special acts of the legislative assembly, was not directly involved in any of the cases above cited. It would seem, however, that the views and conclusions reached in the decisions named necessarily dispose of this feature, but since counsel for petitioner insists that such disposal has not been made, and presents his contention in good faith, we will, at the possible expense of repetition of views announced in the above cases, consider the points thus presented. To begin: Article IV, section 4, of the United States Constitution reads:

> The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature can not be convened), against domestic violence.

In Luther *v.* Borden (7 How., 1, 48) the court observes:

> Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind and authorized the General Government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.
>
> The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature, or of the executive (when the legislature can not be convened), against domestic violence.
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> Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the Government, and could not be questioned in a judicial tribunal.

See also Cooley Const. Lim. (6 ed.), pp. 42, 45; Texas *v.* White (7 Wall. (U. S.), 700, 730); Marshall *v.* Beckham (178 U. S., 548); and 6 Mich. Law Review, 304, where authorities sustaining the above view are collated. We have an illustration of the principles announced in Luther *v.* Borden, in the admission of Oklahoma as a State. Before its statehood was recognized Oklahoma had adopted, as a part of its constitution, the initiative and referendum law-making system, patterned after the Oregon plan; regardless of which its Senators and Representatives were "admitted into the councils of the Union," and "the authority of the Government under which they were appointed, as well as its republican character, is recognized by the proper constitutional authority," thus determining that State, with its comparatively new legislative system, to be republican in form. This recent historical precedent should, in itself, be adequate to set at rest the temporarily mooted question in hand.

This court, however, has heretofore taken jurisdiction of cases of this character (Kadderly *v.* Portland, 44 Oreg., 118; State *v.* Cochrane (Oreg.), 105 Pac., 884), and, owing to the importance of the points presented, we will proceed to a consideration thereof. To ascertain whether taking from the legislature and delegating to the municipalities, or to the localities affected, local self-government, or a right to

enact, maintain, and alter their charters as the legislature formerly did, and whether the taking from the legislature the right to make special laws upon the subject violates this provision of the national Constitution, makes it important that we first ascertain what is meant by a republican form of government. It is an expression which all assume to understand, yet, judging from the many unsuccessful attempts of eminent statesmen and writers to give it a clear meaning, it would seem the phrase is not susceptible to being given a precise definition. Especially is this true when sought to be applied to the constitution of different States, concerning which Mr. James Madison, a member of the Constitutional Convention, said:

* * * If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or may at least bestow that name on a government which derives all its powers directly or indirectly from the great body of the people and is administered by persons holding their offices during pleasure for a limited period or during good behavior. It is essential to such government that it be derived from the great body of society and not from any inconsiderable portion or a favored class of it. * * * (The Federalist, Hamilton Ed., Paper 39, p. 301.)

Another and more pointed definition appears in Chisholm *v.* Georgia (2 Dall. (U. S.), 419, 457) by Mr. Justice Wilson, a member of the Constitutional Convention, who, but a short time after the adoption of the Federal Constitution, in adverting to what is meant by a republican form of government, remarked: "As a citizen, I know the government of that State (Georgia) to be republican, and my short definition of such a government—one constructed on this principle, that the supreme power resides in the body of the people." From which it follows that the converse must be true; that is to say, any government in which the supreme power resides with the people is republican in form. See also Mr. Justice Wilson's remarks to the same effect, reported in Elliot's Debates (vol. 5, 160).

Measured in the light of the above it is difficult to conceive of any system of lawmaking coming nearer to the great body of the people of the entire State, or by those comprising the various municipalities, than that now in use here, and being so we are at a loss to understand how the adoption and use of this system can be held a departure from a republican form of government. It was to escape the oppression resulting from governments controlled by the select few, so often ruling under the assumption that "might makes right," that gave birth to republics. Monarchical rulers refuse to recognize their accountability to the people governed by them. In a republic the converse is the rule; the tenure of office may be for a short or a long period, or even for life, yet those in office are at all times answerable, either directly or indirectly, to the people, and in proportion to their responsibility to those for whom they may be the public agents, and the nearer the power to enact laws and control public servants lies with the great body of the people, the more nearly does a government take unto itself the form of a republic—not in name alone, but in fact. From this it follows that each republic may differ in its political system, or in the political machinery by which it moves, but so long as the ultimate control of its officials and affairs of state remain in its citizens it will, in the eye of all republics, be recognized as a government of that class. Of this we have many examples in Central and South America.

It becomes, then, a matter of degree, and the fear manifested by the briefs filed in this case would seem to indicate, not that we are drifting

from the secure moorings of a republic, but that our State, by the direct system of legislation complained of, is becoming too democratic, advancing too rapidly toward a republic pure in form. This, it is true, counsel for petitioner does not concede, but under any interpretation of which the term is capable, or from any view thus far found expressed in the writings of the prominent statesmen who were members of the Constitutional Convention, or who figured in the early upbuilding of the Nation, it follows that the system here assailed brings us nearer to a state republican in form than before its adoption. Mr. Thomas Jefferson, in 1816, when discussing the term republic, defined and illustrated his view thereof as follows:

> Indeed, it must be acknowledged that the term republic is of very vague application in every language. Witness the self-styled republics of Holland, Switzerland, Genoa, Venice, Poland. Were I to assign to this term a precise and definite idea, I would say, purely and simply, it means a government by its citizens in mass, acting directly and not personally, according to rules established by the majority; and that every other government is more or less republican in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens. (Writings of Thomas Jefferson, vol. 15, p. 19.)

It is well known that at the time of the adoption of the Federal Constitution there existed in some of the Atlantic States a system of local government, known as New England towns, in which the people had the right to legislate upon various matters, the masses assembling at stated periods for that purpose, all of which was within the knowledge of those composing the Constitutional Convention. After observing that a true republic, under his definition, would necessarily be restrained to narrow limits, such as in a New England township, and that the next step in use at that time was through the representative system, Mr. Jefferson pointed out that the further the officials of State or Nation are separated from the masses, proportionately less does such state or government retain the elements of a republic, and on page 23 concludes:

> On this view of the import of the term republic, instead of saying, as has been said, that it may mean anything or nothing, we may say with truth and meaning, that governments are more or less republican as they have more or less of the element of popular election and control in their composition; and believing, as I do, that the mass of the citizens is the safest depository of their own rights and especially that the evils flowing from the duperies of the people are less injurious than those from the egoism of their agents, I am a friend to that composition of government which has in it the most of this ingredient.

The observations quoted are in full accord with the recorded views of all the writers and statesmen of that time, when the intention of the framers of our National Constitution was fully understood; in the light of which it seems inconceivable that a State, merely because it may evolve a system by which its citizens become a branch of its legislative department coordinate with their representatives in the legislature, loses cast as a Republic. The extent to which a legislature of any State may enact laws is, and always has been, one of degree, depending upon the limitations prescribed by its constitution; some constitutions having few and others many limitations. But in all States, whatever may be the restriction placed upon their representatives, the people, either by constitutional amendment or by convention called for that purpose, have had and have the power to directly legislate and to change all or any laws so far as deemed proper,

limited only by clear inhibitions of the National Constitution. (Cooley, Const. Lim. (6 ed.), 44.)

An examination of our State constitution as first adopted discloses many restrictions upon the lawmaking department, among which is a provision to the effect that no amendment thereto should be submitted to the people for ratification until after it passed two successive sessions of the legislature. In course of time an amendment under this provision was legally submitted and adopted by a majority vote of the people by which the people reserved the right to change the constitution or any part thereof without awaiting this legislative formality, the validity of which is not open to doubt. Is it not possible, indeed is it not practicable, then, for the people further to restrict the power of their representatives to legislate upon matters of public interest, and in so doing are they not, and even under the old system were they not, directly legislating? This system of direct legislation has been in common use throughout the various State governments since their inception, but until the adoption of the initiative and referendum amendments no one was heard to assert that an amendment to the constitution of a State, merely because of depriving the legislature of some lawmaking power or powers held by it at the adoption of the National Constitution, was void on the ground of being inconsistent with a republican form of government.

The absurdity of such a contention, if made, would at once be obvious. But, viewed from any standpoint, such is the logical sequence of appellant's contention to the effect that because the people have, by constitutional amendment, reserved the exclusive right to enact special laws concerning municipalities, and by constitutional amendment have delegated to municipal corporations the right to exercise such powers as before were only within the province of their representatives, through the legislature, to delegate, violates the provision of the Federal Constitution guaranteeing to our State a republican form of government. In other words it is argued that the right of the city of Portland to legislate upon matters of municipal concern, to provide for the exercise of its right of eminent domain, to build bridges, etc., would be in harmony with the above provision of the Federal Constitution, if delegated by the people through their representatives, but not so if done directly by them through the initiative. In brief, the effect of this argument is that the people may legally do indirectly, by the mere enactment of a law, what they can not do directly by constitutional amendment. The statement of this contention should be sufficient for its answer.

We held in Straw *v.* Harris (54 Oreg., 424) that a State could not by amendment of its fundamental laws or otherwise, except in the manner provided in section 3, Article IV, of the Federal Constitution, delegate to any municipality or subdivision of the State prerogatives not subject to recall; that so to do would, in effect, be the creation of a State within a State, and that, so long as the legislature is not precluded by the Constitution from enacting general laws affecting them, it may by that method amend, modify, or even abolish municipal corporations, and that even should this power be removed from the legislature there must remain with the people a right to do so, if not by enacting a law to that effect then by the former system of direct legislation, consisting in the adoption of amendments to the consti-

tution, known as the fundamental laws of the State, and that this right of State government to retain control of these agencies and departments of State can not be surrendered, but must always remain somewhere within the reach of that source of all power, the people. We held, and still hold to this view, not on the ground that to hold otherwise would be destructive of a republican form of government, but because to do so would in effect permit a State within a State and accordingly violate section 3, Article IV, of the Federal Constitution, the first paragraph of which reads:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress.

Suppose our lawmaking department should pass an ex post facto act, or a bill of attainder, such purported laws would be void, not because of being subversive of a republican form of government, but by reason of some express inhibition against legislation of that character contained in another section of the Federal Constitution. If the National Constitution permitted or provided for the creation of a State within a State, could it be said that by reason thereof the State thus created would be unrepublican in form? Under section 3 of Article IV, above quoted, States may be divided and new ones created, the limitation being that no State shall be created within a State, but the creation of new States under that section has never been considered an unrepublican step. Should our State attempt to surrender its powers to an executive for life, with the provision that upon his death his authority should pass by entailed inheritance to his son or other relative, and at the same time, by constitutional change or otherwise, further surrender any right to alter the system, except with the consent of such executive, it would lose its republican form, and in effect become a local monarchy within the Union, thereby furnishing an example of a violation of section 4, Article IV, of the Federal Constitution. But, so long as the people retain the power within themselves to conduct and manage the affairs of state—either directly or indirectly—a republican form of government is maintained, and comes within the provision of the Federal Constitution guaranteeing the same, being circumscribed in its powers only by the provisions of such Constitution.

The effect of petitioner's contention is that any attempt on the part of the State to enact and enforce a law which may be in conflict with any provision of the National Constitution is not void because in conflict or inconsistent with the special provision violated, but because it deprives the State of its republican form of government; and this seems to be the character of reasoning adopted by the majority in People *v.* Johnson (34 Colo., 143), to which we are cited as sustaining petitioner's view. In that case the question was whether the consolidation of the city and county of Denver, the boundaries of which were made coterminous, abolished the city government, as distinguished from county government, thereby giving to such organization home rule to the extent of permitting it to do as the constitutional amendment of 1902 provided might be done—enact all local laws and elect such officers at such times as deemed advisable, concerning which it was held by the majority that the

city and county governments, although covering the same territory, remained separate and distinct, requiring different officers to be selected for each, and in a different manner, as before the change.

The reason for the conclusion appears to be on account of other provisions in the constitution of Colorado, the majority not recognizing the rule, invoked without exception in all other jurisdictions, including ours, that constitutions with amendments must be construed as a whole, and that when two constructions are possible, one of which takes away the meaning of a section, and another giving effect to all the provisions, the latter must prevail. (State *v.* Cochran, Oreg., 105 Pac., 884; Farrell *v.* Port of Portland, 52 Oreg., 582.) In an able and exhaustive dissenting opinion in that case by Mr. Justice Steele, concurred in by Mr. Justice Gunter, it is made clear that a Federal question (such as here presented) was not involved; that the 1902 amendment of Colorado's constitution was not inconsistent with section 4, Article IV, of the Federal Constitution. After demonstrating that the conclusion announced by the majority "overlooks the fundamental rule in the construction of constitutions and statutes that a special provision controls the general one and that both may stand * * *" (34 Colo., 189), at the close of his opinion (p. 193) it is observed:

> Wherever the question has been presented the courts have given effect to the wishes of the people and sustained the power to establish the form of government here provided as not being in violation of the Federal Constitution and not in excess of the powers of the people to so provide in their organic law. And it is to be regretted that this court felt in duty bound to undo the work of the charter convention and to deny the people of this city and county the right to provide for a simple and economical plan of government as directed by the constitution.

Our holding is that the State may, by constitutional provisions, directly delegate to municipalities any powers which it, through the legislature, could formerly have granted indirectly. All the prerogatives attempted to be exercised by Portland in the construction of the Broadway Bridge formerly could have been granted by the legislature, and the power to provide therefor, having been delegated to the city by amendment to our organic laws, is valid, and the right to exercise such powers will continue until such time as changed by general enactments of the lawmaking department of our State, provision for which may be made by the legislature by general laws, applying alike to all municipalities of that class, or by the people through the initiative, by the enactment of either general or special laws on the subject. (Cooley Const. Lim. (6 ed.), 41, 45; Hopkins *v.* Duluth, 81 Minn., 189; In re Pfahler, 150 Cal., 71; Ex parte Wagner, 21 Okla., 33; State *v.* Field, 99 Mo., 352; Kansas *v.* Marsh, 140 Mo., 458; Kadderly *v.* Portland, 44 Oreg., 118; State *v.* Pacific States Tel. & Tel. Co., 53 Oreg., 163; Straw *v.* Harris, 54 Oreg., 424; Hownestine *v.* City of McMinnville (Oreg.), 109 Pac., 81.)

In a public address prepared by Hon. Frederick V. Holman, attached to and filed as an appendix to petitioner's brief, it is argued that our previous holding in Hall *v.* Dunn (52 Oreg., 475) and Straw *v.* Harris (54 Oreg., 424), to the effect that we have but one lawmaking department, composed of two separate and distinct lawmaking bodies: (1) The people, acting directly through the initiative, and (2) the people acting indirectly through the legislature; either of which, in a manner provided by law, may undo the work of the other,

and necessarily must lead to disastrous results, etc., in that an act passed by the first may, immediately on the convening of the legislature, be repealed, and one enacted by the legislative assembly may also be rescinded through either the initiative or the referendum. But that objection applies only to the question of expediency, with regard to which the lawmakers and not the courts are concerned. It might not be inappropriate, however, to observe that the same objection may, with equal force, apply to all legislative bodies. Our legislature to convene next week can, if it so chooses, repeal all the laws (not included in constitutional amendments) enacted at the recent November election, and also undo the work of the last legislative assembly. Again, two years later, or earlier, a special session of the legislature might be called and enact many laws, and the day following its adjournment the newly elected legislature could be convened and repeal all the laws going into effect the preceding day. The same may also be said of Congress; but this is seldom, if ever, urged as an argument against a representative system or alluded to as indicating that our Government is becoming unrepublican in form.

In the appendix mentioned it is observed that under our system, as interpreted by this court, we have four legislative bodies in place of two: (1) The legislature; (2) the people of the whole State; (3) the people of a municipality; (4) the common council or commissioners. This suggestion, however, overlooks the fact that in the above-cited cases advertence was made only to legal departments of the State, and not to municipal or other minor and quasi-legislative bodies. The fallacy of this illustration (like many others to which our attention is directed, and which will not be specifically discussed) is obvious.

The observation to the effect that, under the interpretation given by this court to the charter amendments, cities may invade the domain of State legislation to the extent, if desired, of condemning State property (such as capitol buildings, etc.), has no justification, either in the language of the charter amendments, or in anything said in any opinion of this court in interpreting such amendments.

Many of the statements in our former opinions, bearing upon points here presented, are adverted to as dictum, and like contention is also made respecting our holding in the case at hand, to the effect that it is unnecessary to obtain the consent of the port of Portland before the bridge in question may be constructed. The points decided, determining the status of the port of Portland in the matter, were all forcibly presented in the briefs and at the oral argument, and the effect of the conclusion reached by this court was that, taking either horn of the dilemma, appellant's position is untenable. It can not, therefore, be said that our views upon either point are dicta, and the same may be remarked of much, if not all, of the numerous like references to previous adjudications by this court (as in Straw *v.* Harris and other cases), in which the views alluded to as dicta hold adversely to the wishes and contention of the writers of petitioner's brief and the appendix thereto. On what is dicta and the effect thereof, see Kirby *v.* Boyette (118 N. C., 244, 254); Buchner *v.* C. M. & N. W. Ry. Co. (60 Wis., 264); Kane *v.* McCown (55 Mo., 181); Ocean Beach Ass'n *v.* Brinley (34 N. J. Eq., 438); 26 Am. Eng. Ency. L., 165, 171; Florida Cent. Ry. Co. *v.* Schutte (103 U. S., 118, 143). The terms "obiter dicta,"

"dictum," etc., like the phrase "technicalities of the law," are too often invoked by counsel to express disapprobation of some proposition of law militating against their contention.

Numerous other points are presented, upon which the views of this court are requested. Some of them, however, were disposed of in our former opinions herein, to which we still adhere, and those remaining, even though not specifically adverted to, are included in the above considerations.

The petition for rehearing is denied.